WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SKYE GRAY, *Applicant*

vs.

COMFORT KEEPERS HOME CARE;
STARSTONE TORUS, adjusted by TPA SEDGWICK, *Defendants*

Adjudication Number: ADJ13210964
Los Angeles District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of a Findings & Award & Order (F&O) issued by a workers' compensation administrative law judge (WCJ) on March 20, 2023, wherein the WCJ found in pertinent part that applicant sustained industrial injury arising out of and in the course of her employment.

Defendant contends that the going and coming rule bars applicant's claim of industrial injury because the length of an employee's commute does not create an exception to the going and coming rule; and, because she was traveling in an ordinary commute to a fixed location.

Applicant filed an Answer to Petition for Reconsideration (Answer). The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), recommending that the petition be denied because the F&O did not issue based on the distance applicant travelled to the relevant assignment but rather, because defendant testified that applicant was required to have reliable transportation to travel to caregiver assignments and was not traveling to a fixed business at a fixed time.

We have reviewed the record in this case, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. Based on the Report, which we adopt and incorporate herein, and for the reasons stated below, we deny reconsideration.

DISCUSSION

Liability for workers' compensation accrues for an injury "arising out of and in the course of the employment." (Lab. Code, § 3600, subd. (a).) "[A]ny reasonable doubt as to whether the act of the employee is contemplated by the employment should be resolved in favor of the employee in view of the policy of liberal construction of the workmen's compensation laws." (*Tingey v. Industrial Acci. Com.* (1943) 22 Cal.2d 636, 641; see also Lab. Code, § 3202 and *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 733 [48 Cal.Comp.Cases 326].)

"Under the well established going and coming rule, an employee does not pursue the course of his employment when he is on his way to or from work." (*Smith v. Workmen's Comp.App.Bd.* (1968) 69 Cal.2d 814, 815-816 [33 Cal.Comp.Cases 771] (*Smith*) citing *Zenith Nat. Ins. Co. v. Workmen's Comp. App. Bd.* (1967) 66 Cal.2d 944, 946.) Thus, injuries sustained while an employee is "going and coming" to and from the place of employment do not normally arise out of and in the course of employment because the employee is neither providing benefit to the employer nor under the control of the employer during that commute. (*Santa Rosa Junior College v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 345, 351–352 [1985 Cal. LEXIS 410]; *Hinojosa v. Workers' Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 157 [37 Cal.Comp.Cases 734] (*Hinojosa*).) It applies to a 'local commute enroute to a fixed place of business at fixed hours.' (*Hinojosa, supra*, 8 Cal.3d at p. 157.)" (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038 [82 Cal.Comp.Cases 692].)

The WCJ found that applicant's claim falls within the "required vehicle" exception to the going and coming rule:

> [E]ven though Applicant selected the shifts she would work, travel to these shifts was not "fixed", [*sic*] and the shifts did not start at "fixed" hours. The shifts were in different places depending on where the client's home was, and the shifts could start at any time of day. Applicant was not required to have a car, but was required to have reliable transportation, and she testified at trial that she "didn't know if the employer required her to use a certain type of transportation, but how else would she get there, except by using her own car."
>
> Certainly the employer benefitted from applicant arriving on time for her shift by using her own car, and not relaying [*sic*] on public transportation at that time of night, which might not have even been available.
> ...

> Applicant was not required to have a car available at work, but she was specifically required to have "reliable transportation", [*sic*] and even though the employer testified at trial that a bus pass would suffice, considering that the work shifts did not start at fixed times, and applicant did not travel to a fixed location, it was not unreasonable for her to assume that the way to best serve the employer's interests was to use her own vehicle when she traveled to and from clients' homes, and applicant's injury occurred while driving her own vehicle. (Report, pp. 4-6.)

We agree with the WCJ that there is substantial evidence in this case to apply the "required vehicle" exception to the going and coming rule. The "required vehicle" exception may be invoked when "the employee is expressly or impliedly required or expected to furnish his own means of transportation to the job (*Smith v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 814 [73 Cal. Rptr. 253, 447 P.2d 365])." (*Hinojosa v. Workemen's' Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 160 [37 Cal.Comp.Cases 734] (*Hinojosa*).) "The exception 'arises from the principle that an employee "is performing service growing out of and incidental to his employment" (Lab. Code, § 3600) when he engages in conduct reasonably directed toward the fulfillment of his employer's requirements, performed for the benefit and advantage of the employer.' (*Smith, supra*, at pp. 819–820.)" (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1039 [82 Cal.Comp.Cases 692].)[1]

We note that defendant's CEO and co-owner Michael Craig, II, confirmed at trial that the job description for personal care aides included the requirement, "Must have reliable transportation." (Trial Transcript, December 8, 2022, p. 46, emphasis added.) Mr. Craig also confirmed the requirement that personal care aides hold a "[v]alid driver's license and automobile insurance preferred." (*Ibid.*) Thus, applicant was required to furnish her own means of "reliable transportation" to travel to clients' homes, and the employer's stated preference was that her "reliable transportation" was her car. As the WCJ states, it was "not unreasonable for [applicant]

[1] In *Zhu*, the WCJ found that Ms. Zhu's injury was compensable based on the "required vehicle" exception to the going and coming rule. (*Zhu, supra*, 12 Cal.App.5th at p. 1036.) However, and consistent with defendant's contentions in this case, the Appeals Board reversed the WCJ and found Ms. Zhu's claim barred by the going and coming rule because applicant "merely used defendant to obtain client referrals" and because she "chose the means of transport to her clients." (*Yu Qin Zhu v. Department of Soc. Servs. IHSS*, 2016 Cal.Wrk.Comp. P.D. LEXIS 513, *8, reversed and remanded in *Zhu, supra.*) The Appeals Board concluded that applicant's case did not come within any exception to the going and coming rule "because defendant did not have control over applicant's commute, and the benefit to defendant as a result of applicant's self-transport was indirect and minimal compared to the ease and convenience realized by applicant." (*Id*., at *9 citing *Lantz v. Workers' Comp. Appeals Bd.* (2014) 226 Cal.App.4th 298, 309 [79 Cal.Comp.Cases 488].) On review, the District Court of Appeal disagreed with the Appeals Board, annulled the decision and remanded the matter to the Appeals Board for a new decision. (*Zhu, supra*, 12 Cal.App.5th at p. 1035-1036, 1042.)

to assume that the way to best serve the employer's interests was to use her own vehicle when she traveled to and from clients' homes." (Report, p. 6.)

Accordingly, the WCJ's decision in this case that applicant's claim is not barred by the going and coming rule is consistent with *Hinojosa, Smith,* and *Zhu*, and we therefore deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings & Award & Order issued by a workers' compensation administrative law judge on March 20, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ **CRAIG SNELLINGS, COMMISSIONER**

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 13, 2023

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

SKYE GRAY
LAW OFFICES OF HALEH SHEKARCHIAN
THE IVEY LAW FIRM

AJF/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

REPORT AND RECOMMENDATION

ON PETITION FOR RECONSIDERATION[2]

I.

INTRODUCTION

Defendant, by and through their attorneys of record, has filed a timely, verified Petition for Reconsideration challenging the Findings and Order of 3/20/2023. No answer has been received from Applicant to date.

II.

FACTS

Skye Gray, born [] claims to have sustained injury arising out of and in the course of her employment on 7/16/2019 to fractured bones, head/brain, back, neck, right shoulder, right arm, breathing issues, hips, pelvis, left ankle, right leg, right foot, uterus, stomach upper extremities and lower extremities due to an auto accident. Applicant was in a coma for a period after the accident. Applicant was pregnant at the time of the injury and miscarried after the auto accident.

The following facts were adduced at trial. Applicant was a caregiver who had been recently hired by the employer. Employees bid on available shifts and are required to have reliable transportation to get to the shifts per Exhibit C of Defendant's exhibits. An employee would contact the employer via email when the employee was available for a shift. The employee may accept or reject an assignment.

Applicant was driving to her shift in her personal vehicle when she was involved in a motor vehicle accident shortly before midnight. This was the first time the Applicant had been to this particular location.

[2] All errors in the original.

The only issue submitted for decision was whether the injury was AOE/COE, specifically whether or not the Applicant's automobile accident occurred during the course and scope of her employment. The parties requested that the going and coming rule be addressed.

The Court found the injury to be compensable and that it was not barred by the going and coming rule.

III.

DISCUSSION

The facts related by the defendant are true when taken at face value. Applicant was on her way to work at the time of the injury. She did request that she be assigned to this shift, and this specific job did not require her to run errands for the client or take the client anywhere. Defendant states in both its Petition for Reconsideration and its trial brief that the distance between applicant's home and her job assignment was 17-23 miles. This was never challenged by the applicant.

The shift for which applicant was injured started at midnight and applicant's motor vehicle collision occurred just before midnight. Another vehicle struck her car and this vehicle was found to be at fault for the MVA. The employer testified at trial and stated that the majority of caregiver shifts were put up for bid via email, and the employees could choose which shift they wanted. Applicant was not required to take this shift, but the only way she could earn money at this job was to bid on shifts that were available.

Although Applicant was told not to run errands for this particular shift, the employer testified at trial that some shifts did require this. The paperwork for the Shifts would indicate whether this was required or not. If it was not required, the employer would put this information in the paperwork so the client would not take advantage of the employee.

This decision did not issue based on the distance applicant had to travel to the assignment. Applicant was not traveling between assignments at the time of the MVA. She was not carrying supplies or tools for the employer.

However, the employer did testify at trial that Applicant was required to have reliable transportation. The employer testified that a bus pass would be sufficient. But in this case,

Applicant was traveling late at night to a new location, and it is unknown whether any public transportation was even available at that time of day, to the location she was traveling. She was not travelling to a fixed business at a fixed time. It is for these reasons that the Court found applicant's injury compensable and not barred by the going and coming rule.

Defendant relies upon *Hinojosa v. WCAB* (1972) 8 Cal 3d 150; 37 CCC 734, a well known decision regarding the going and coming rule. Many practitioners regard it as one of the leading cases on this subject.

Hinojosa notes on page 736 that California's going and coming rule is not a statutory limitation, but "wholly a judicially created one." The Court further states on page 736, "In substance the courts have held non-compensable the injury that occurs during a local commute enroute to a fixed place of business at fixed hours in the absence of special or extraordinary circumstances."

The Court states further on page 739 that, "We shall point out that the cases, distinguishing between transits that are local commutes to fixed places of business at fixed hours and those that are not, hold injuries compensable that are incurred in transits that do fall into the second category." The Court noted on page 739 that, "[M]any situations do not involve local commutes enroute to fixed places of business at fixed hours. These are the extraordinary transits that vary from the norm because the employer requires a special different transit, or use of a car, for some particular reason of his own." The Court states that in such situations, the employer's imposition of an unusual condition restores the employer-employee relationship.

The Court cites to *Cal. Cas. Ind. Exch v. Ind. Acc Com.* (1943) 21 Cal.2d 75d1, 135 P.2d 158 on page 737 where it stated, "" In view of this state's policy of liberal construction in favor of the employee," a unanimous court held, any reasonable doubt as to the applicability of the going and coming doctrine must be resolved in the employee's favor. "

The Court went on to discuss that the going and coming rule composes no formula of automatic application, and that the exceptions have swallowed the rule *Hinojosa* at page 738.

This Court in the within case at bar found that even though Applicant selected the shifts she would work, travel to these shifts was not "fixed", and the shifts did not start at "fixed" hours. The shifts were in different places depending on where the client's home was, and the shifts could start at

any time of day. Applicant was not required to have a car, but was required to have reliable transportation, and she testified at trial that she "didn't know if the employer required her to use a certain type of transportation, but how else would she get there, except by using her own car."

Certainly the employer benefitted from applicant arriving on time for her shift by using her own car, and not relaying on public transportation at that time of night, which might not have even been available.

The Court held in *Smith v. WCAB* (1968) 69 Cal. 2d 814; 33 CCC 771, on page 775 that an employee "is performing service growing out of and incidental to his employment when he engages in conduct reasonably directed toward the fulfillment of his employer's requirements, performed for the benefit and advantage of the employer." In *Smith*, the employer required the worker to furnish a vehicle of transportation on the job and the Court found that this "curtails the application of the going and coming exclusion." The Court went on to say on page 776 that, "Indeed, an employer must be conclusively presumed to benefit from employee action reasonably directed towards the execution of the employer's orders or requirements. An employer cannot request or accept the benefit of an employee's services and concomitantly contend that he is not "perfomring service growing out of and incidental to his employment."

Applicant was not required to have a car available at work, but she was specifically required to have "reliable transportation", and even though the employer testified at trial that a bus pass would suffice, considering that the work shifts did not start at fixed times, and applicant did not travel to a fixed location, it was not unreasonable for her to assume that the way to best serve the employer's interests was to use her own vehicle when she traveled to and from clients' homes, and applicant's injury occurred while driving her own vehicle.

IV.

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

LOIS OWENSBY
Workers' Compensation Judge

Date: 4/26/2023